METROPOLITAN
Community College

October 24, 2018

Adam B. Steinbaugh
Director, Individual Rights Defense Program
Foundation for Individual Rights in Education
510 Walnut Street
Suite 1250
Philadelphia, PA 19106

RE: Metropolitan Community College Records Request

Dear Mr. Steinbaugh:

The College is in receipt of your October 15, 2018, public records request for the following documents:

1. A copy of the settings for the Facebook page maintained by Metropolitan Community College (available at https://www.facebook.com/MCCnebraska). This list is accessible by (A) logging into the Facebook page as an administrator, and then (B) clicking "Settings" at the top of the official page. The URL should look like: https://www.facebook.com/MCCnebraska/settings/?tab=settings.

2. A copy of the list of people or pages banned from the Facebook page referenced above. This list is accessible by: (A) logging into the Facebook page as an administrator, (B) clicking "Settings" at the top of the official page, (C) clicking "People and Other Pages" in the left column, and (D) selecting "Banned People and Pages" from the drop-down menu. The final URL should look like: https://www.facebook.com/MCCnebraska/settings/?tab=people_and_other_pages.

3. A list of the "blocked accounts" by the Twitter account maintained by Metropolitan Community College (available at https://twitter.com/mccneb). This list is accessible by navigating to this URL while logged into the account: https://twitter.com/settings/blocked.

The College, pursuant to the Nebraska public records statutes (Neb.Rev.Stat. §§ 84-712 to 84-712.09), respectfully denies your request.

The reason for the decision to deny your request is that the requested records are not records of or belonging to the College. Neb.Rev.Stat. § 84-712.01(1) defines public records as "…records and documents, regardless of physical form, **of or belonging to**…" a political subdivision. (Emphasis added). The College does not own any public records, as that term is defined at

Neb.Rev.Stat. § 84-712.01(1), through or from Facebook, Twitter, or other social media platforms. Your records request specifically instructs the College to follow various weblinks to access and retrieve the requested records from an external third party. As such, your request seems to acknowledge that the records requested are records of, and owned by, a third party that is external to and separate from the College, namely Facebook and Twitter, and that in order to provide the requested documents the College would have to first acquire them from said third party. Information on a social media platform does not belong to the College, and there is no requirement that the College must conduct a search of external social media platforms to respond to a public records request.

Additionally, as the College is not the owner of records of Facebook and Twitter it would be very hesitant to certify or stand behind the accuracy of any such records.

The decision to deny the requests was made by James R. Thibodeau, Associate Vice President for Compliance and General Counsel for the Metropolitan Community College Area.

Pursuant to Neb.Rev.Stat. § 84-712.03:

> (1) Any person denied any rights granted by Neb.Rev.Stat. §§ 84-712 to 84-712.03 may elect to:
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> > (a) File for speedy relief by a writ of mandamus in the district court within whose jurisdiction the state, county, or political subdivision officer who has custody of the public record can be served; or
> >
> > (b) Petition the Attorney General to review the matter to determine whether a record may be withheld from public inspection or whether the public body that is custodian of such record has otherwise failed to comply with such sections, including whether the fees estimated or charged by the custodian are actual added costs or special service charges as provided under section 84-712. This determination shall be made within fifteen calendar days after the submission of the petition. If the Attorney General determines that the record may not be withheld or that the public body is otherwise not in compliance, the public body shall be ordered to disclose the record immediately or otherwise comply. If the public body continues to withhold the record or remain in noncompliance, the person seeking disclosure or compliance may (i) bring suit in the trial court of general jurisdiction or (ii) demand in writing that the Attorney General bring suit in the name of the state in the trial court of general jurisdiction for the same purpose. If such demand is made, the Attorney General shall bring suit within fifteen calendar days after its receipt. The requester shall have an absolute right to intervene as a full party in the suit at any time.
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> (2) In any suit filed under this section, the court has jurisdiction to enjoin the public body from withholding records, to order the disclosure, and to grant such other equitable relief

as may be proper. The court shall determine the matter de novo and the burden is on the public body to sustain its action. The court may view the records in controversy in camera before reaching a decision, and in the discretion of the court, other persons, including the requester, counsel, and necessary expert witnesses may be permitted to view the records, subject to necessary protective orders.

(3) Proceedings arising under this section, except as to the cases the court considers of greater importance, shall take precedence on the docket over all other cases and shall be assigned for hearing, trial, or argument at the earliest practicable date and expedited in every way.

If you have further questions please feel free to contact me at (531)622-2428, or jrthibodeau@mccneb.edu.

Sincerely,

James R. Thibodeau
General Counsel

JRT

FIRE
Foundation for Individual Rights in Education

October 31, 2018

James R. Thibodeau
Associate Vice President for Compliance and General Counsel
Metropolitan Community College
P.O. Box 3777
Omaha, Nebraska 68103

Sent via U.S. Mail and Electronic Mail (jrthibodeau@mccneb.edu)

Dear Mr. Thibodeau:

I am in receipt of your October 24, 2018, letter on behalf of Metropolitan Community College ("MCC") rejecting my October 15, 2018, request under the Nebraska Public Records Law. That request seeks records concerning MCC's official Facebook and Twitter pages and the settings MCC has placed on content that may be posted on, or persons who may access, those pages.

MCC argues that it does not "own" its official social media accounts and that the records do not "belong" to MCC because they are accessible via Facebook and Twitter. I am writing to ask that MCC reconsider its rejection.

MCC's argument relies on the notion that data's presence on a system provided by Facebook or Twitter means that it is a record belonging to those entities, not MCC. On this basis, MCC shares doubts about the accuracy of records it maintains on those systems. There does not appear to be any reason to doubt the accuracy of the records, other than that they're stored in an electronic format. MCC's faith in the ability of Facebook and Twitter to accurately store MCC's records is evident in the institution's continued use — multiple times per day — of its official social media accounts.

More importantly, public access to records turns on whether the agency has access, not whether it is in physical possession of records. Nebraska's Supreme Court, construing the "of or belonging to" language relied upon by MCC here, has expressly declined to accept the notion that physical possession is dispositive. *Evertson v. City of Kimball*, 278 Neb. 1, 9–10 (2009).

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The Court in *Evertson* wrote:

> The City argues that the "of or belonging to" language in § 84-712.01 means a public body must have ownership of, as distinguished from a right to obtain, materials in the hands of a private entity. But the City's narrow reading of the statute would often allow a public body to shield records from public scrutiny. It could simply contract with a private party to perform one of its government functions without requiring production of any written materials.
>
> Section 84-712.01 does not require a citizen to show that a public body has actual possession of a requested record. Construing the "of or belonging to" language liberally, as we must, this broad definition includes any documents or records that a public body is entitled to possess--regardless of whether the public body takes possession. The public's right of access should not depend on where the requested records are physically located. Section 84-712.01(3) does not permit the City's nuanced dance around the public records statutes.

Id.

Accordingly, even assuming the records were held by private parties,[1] those records remain subject to the Public Records Law if (1) the public body "contracted with a private party to carry out [a] government function; (2) the private party prepared the records under the public body's delegation of authority; (3) the public body was entitled to possess the materials to monitor the private party's performance; and (4) the records are used to make a decision affecting public interest." *Id.* at 12. In utilizing Facebook and Twitter to operate public fora, MCC has created and maintains records on Facebook and Twitter which it is "entitled to possess" at any time, day or night, by entering its login information. These records determine what content may be posted—and who may post content—on MCC's open social media fora.

Finally, I should note that of the 220 institutions polled in this survey, only 15 have objected to production or asked for compensation to fulfill the requests. That leaves MCC conspicuously in the minority of institutions that have refused to disclose the regulations they impose on public speech on the digital fora created by those public institutions.

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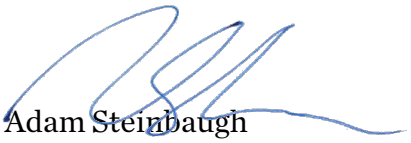
[1] To the contrary, MCC maintains control over the information at all times. That the information is stored on a server makes it no less an agency record than an email stored on a Google server, or a Word document stored on iCloud. Further, the statutory authority cited by SCC expressly includes "all records *and* documents, *regardless of physical form*." Neb. Rev. Stat. § 84-712.01 (emphasis added). The record exists in the form of data provided by SCC to Facebook and Twitter. How the information is located is irrelevant to whether it exists, and providing a hyperlink is no different than describing the file cabinet or folder in which the record may be found.

Please apprise me before the close of business on Wednesday, November 7, 2018, whether MCC will comply with the Nebraska Public Records Law by providing the requested records.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

METROPOLITAN
Community College

November 7, 2018

Adam B. Steinbaugh
Director, Individual Rights Defense Program
Foundation for Individual Rights in Education
510 Walnut Street
Suite 1250
Philadelphia, PA 19106

RE: Metropolitan Community College Records Request

Dear Mr. Steinbaugh:

I am in receipt of your correspondence of October 31, 2018. In your letter, you request that Metropolitan Community College ("MCC" or "College") reconsider its denial of your request. MCC respectfully declines to do so.

It is MCC's position that your reliance on *Evertson v. City of Kimball*, 278 Neb. 1; 767 N.W.2d 751 (2009), under the present circumstances is misplaced. MCC suggests that the proper test to be utilized in this matter is the four part functional equivalency test relied upon by the Nebraska Supreme Court in *Frederick v. City of Falls City*, 289 Neb. 864; 857 N.W.2d 569 (2015).

In *Frederick* the Court held that the four part functional equivalency test "[I]s the appropriate model for determining whether a private entity which has an ongoing relationship with a governmental entity can be considered an agency, branch or department of such governmental entity within the meaning of 84-712.01(1), such that its records are subject to disclosure upon request under Nebraska's public records laws." *Id* at 874. The Court went on to say that "[T]he *Evertson* test is better suited to documents prepared in the course of an isolated transaction between a public body and a private entity" which are retained by the private entity. *Id* at 874. When the relationship between the public and private entities is ongoing, as is the case in the present matter, the proper test to employ is the four part functional equivalency test employed by the Court in *Frederick.*

In explaining the basis for its holding that *Evertson* is applicable when the public and private entities engage in an isolated transaction rather than an ongoing relationship, the Court in *Frederick* wrote:

> We recognized that many courts have adopted functional equivalency tests which focus on whether the documents are in the possession of a "hybrid public/private entity: an entity created by, funded by, and regulated by the public body." We noted that such tests "appear appropriate when a private entity performs an ongoing government function." But recognizing that the facts in *Evertson* did not involve an ongoing relationship between the city and the private entity, we observed that a functional equivalency test would not be appropriate because "requiring citizens to

> show that a private party functions as a hybrid government entity creates a loophole that would often allow public bodies to evade public records laws."
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> *Id* at 872.

In setting forth the four-part functional equivalency test in *Frederick*, the Court stated:

> As originally formulated by the Supreme Court of Connecticut, the functional equivalency test considers (1) whether the private entity performs a governmental function, (2) the level of government funding, (3) the extent of government involvement or regulation, and (4) whether the private entity was created by the government. This test is applied on a case-by-case basis, with no single factor being dispositive. Whether an entity meets the statutory definition of a public or governmental agency under a functional equivalency test presents a question of law.
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> *Id* at 874.

It is the position of MCC that, in the present matter, the most reasonable conclusion under the functional equivalency test is that the records you requested in your public records request of October 15, 2018, are not records "of or belonging to" the College, thus not public records that the College must acquire from a private third party and provide upon demand. First, under the test, it is not at all clear that the act of maintaining the requested records is a government function performed by Facebook and Twitter on behalf of the College. There is no requirement or mandate that the College perform the tasks for which it utilizes Facebook and Twitter, its use of the private entities is completely discretionary and could be terminated at any time without recourse by either entity or the public.

Second, if either Facebook or Twitter receive any funding from the College for the performance of its services, which the College does not concede, it is nominal and is the same "fee for services" that is paid to them by all other similar users, public or private. Neither Facebook nor Twitter are entities that rely upon continuing funding from the College for any part of their continuing operations.

Third, the College is not even remotely involved in the operation or regulation of either Facebook or Twitter.

And, finally, fourth, neither Facebook nor Twitter was created by the College. To the best of MCC's knowledge and belief, both entities were created by private individuals, not by or for the benefit of the College or any other government entity.

After applying the factors set forth by the Court in *Frederick* to the facts in the present matter, it remains the position of MCC that the documents you requested from the College in your request of October 15, 2018, are not documents that are "of, or belonging to" the College, and that they are not proper subjects of a public records request under Nebraska law. The records requested

are not records owned by the College, the format and content of the requested records was created by each private entity, and the College would have to go onto the private third parties' web sites to download the requested records in order to produce them. The fact that the requested records may pertain to the College does not make them "of, or belonging to" the College, and does not make them public records that the College must acquire from a private third party and disclose pursuant to a public records request.

Accordingly, in reliance on the Nebraska public records laws and the opinion of the Nebraska Supreme Court, MCC respectfully declines your request to reconsider its position.

The decision to maintain the College's original position, and to again deny your October 15, 2018, public records request, in reliance on the Nebraska public records laws and the opinion of the Nebraska Supreme Court, was made by James R. Thibodeau, Associate Vice President for Compliance and General Counsel. You are, of course, free to pursue the remedies set forth in Neb.Rev.Stat. § 84-712.03, as more fully set forth in my correspondence of October 24, 2018, and any other remedies that may be available under state law.

Sincerely,

James R. Thibodeau
General Counsel

JRT
cc. Randy Schmailzl, College President